IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETROPLAST PETROFISA PLASTICOS S.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4304-VCP
	)	
AMERON INTERNATIONAL CORP.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: March 1, 2011
Decided: July 1, 2011

Neal J. Levitsky, Esq., Seth A. Niederman, Esq., FOX ROTHSCHILD LLP, Wilmington, Delaware; Manuel S. Varela, Esq., Joseph L. Ruby, Esq., BAACH ROBINSON & LEWIS PLLC, Washington, District of Columbia; *Attorneys for Plaintiff Petroplast Petrofisa Plasticos S.A.*

Gregory P. Williams, Esq., Rudolf Koch, Esq., RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; David A. Dillard, Esq., G. Warren Bleeker, Esq., CHRISTIE, PARKER & HALE, LLP, Pasadena, California; *Attorneys for Defendant Ameron International Corporation*

PARSONS, Vice Chancellor.

This action arises from a technology-sharing relationship between Plaintiffs, Petroplast Petrofisa Plasticos S.A. ("Petroplast") and Petrofisa Do Brasil, Ltda. ("Petrofisa") (collectively, "Plaintiffs"), and Defendant, Ameron International Corporation ("Ameron"). Plaintiffs brought suit against Ameron in January 2009 for, among other things, breach of contract based on Ameron's alleged failure to perform its end of a bargain the parties had struck.

This matter is before me on the parties' cross motions for summary judgment. Having carefully considered the parties' extensive submissions and their presentations at the argument held on March 1, 2011 (the "Argument"), I have decided to deny both motions because numerous issues of material fact remain in dispute. Nonetheless, as discussed *infra*, I have made several summary findings pursuant to Rule 56(d) regarding certain discrete issues where the facts are without substantial controversy. Those facts shall be deemed established for purposes of trial.

I. BACKGROUND

A. The Parties

Petroplast is a pipe manufacturing company organized and headquartered in Argentina.[1] It is a member of the Grupo Petroplast companies.[2] Petroplast deals primarily in the business of engineering systems for projects involving the processing, transportation, and storage of fluids and also engages in the transportation of electric

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1 First Am. Compl. (the "Complaint") ¶ 10.

2 *Id*. ¶ 11.

power. One of Petroplast's core businesses is the manufacturing of composite pipe for use in infrastructure projects.[3]

Petrofisa is a Brazilian pipe manufacturing company primarily engaged, directly and through its affiliates, in substantially the same business as Petroplast.[4] Petrofisa is a Brazilian affiliate of Grupo Petroplast and is 50% owned by the owners of Petroplast.[5] Like Petroplast, Petrofisa also manufactures composite pipe for use in infrastructure projects. In that regard, it uses the same pipe manufacturing techniques as Petroplast and relies on Petroplast for its engineering design and long-term testing and modeling service needs.

Ameron, a Delaware corporation with its principal place of business in Pasadena, California, manufactures pipe from various materials, including steel, concrete, and fiberglass.[6] Ameron markets its piping systems to utility companies and operators of oil platforms and marine vessels, among others. It sells its products internationally, serving

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3 *Id*.

4 *Id*. ¶ 12.

5 *Id*. ¶ 14.

6 *Id*. ¶ 15; Def.'s Op. Br. in Support of its Mot. for Summ. J., or in the Alternative, for Partial Summ. J. ("DMSJ OB") 4-5. The parties each fully briefed the two motions at issue here: Plaintiffs' motion for summary judgment ("PMSJ") and Defendant's motion for summary judgment ("DMSJ"). As with the preceding citation to the opening brief in connection with Ameron's motion, I refer to Plaintiffs' answering brief on that motion and Ameron's reply as "DMSJ AB" and "DMSJ RB," respectively. Similarly, I refer to Plaintiffs' opening brief in support of their motion for summary judgment as "PMSJ OB," Ameron's answering brief as "PMSJ AB," and Plaintiffs' reply brief as "PMSJ RB."

markets in the United States, Latin America, Europe, Africa, and Asia. In particular, Ameron sells sand-core pipe manufactured using various methods. This litigation relates to a specific type of sand-core pipe it manufactures, Reinforced Polymer Mortar Pipe ("RPMP").

B. Facts[7]

1. The paston system

In 2000, Plaintiffs, through a joint venture, developed a new system of manufacturing sand-core pipe, which they called the "paston system."[8] The paston system proved to have many advantages over Plaintiffs' previous method, the "shower system," because, among other things, it uses "a mechanical vibrator . . . which agitates the mortar mixture so it deposits itself neatly and evenly on the mesh" and, therefore, permits Plaintiffs to manufacture an exterior pipe wall of more uniform size.[9] Petroplast installed this system in both its plant in Argentina and Petrofisa's Plant in Curitiba, Brazil (the "Curitiba Plant" or "Plant").[10]

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7 See the Court's Memorandum Opinion of October 28, 2009 for additional background on this action. Docket Item ("D.I.") 35; *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009). For the sake of brevity, I summarize briefly the facts pertaining to the issues discussed in this Memorandum Opinion.

8 D.I. 157, Aff. of Pedro Pablo Piatti in Supp. of PMSJ ("Piatti Aff."), ¶¶ 9-10.

9 *Id*. ¶ 10. Essentially, the paston system thoroughly mixes sand and resin so the resulting mortar is uniform, the sand particles are completely coated with resin, the mixture is dense and compacted, and the mortar layer is deposited on the pipe evenly and with uniform thickness. *Id*.

10 *Id*. ¶ 11.

2. Petroplast and Ameron correspond via email

In March 2001, looking to partner with a larger, more sophisticated company, Petroplast's vice president and part-owner, Pedro Pablo Piatti, contacted Ameron to see if it was interested in negotiating a joint venture between the two companies.[11] After some time, the group president of Ameron's Fiberglass Pipe Group, Gordon Robertson, visited Piatti at Petrofisa's Curitiba Plant in April 2002 to discuss the possibility of the companies doing business together.[12] Robertson ultimately decided not to pursue a joint venture with Petroplast. Nevertheless, he advised Ameron's corporate vice president of research and engineering, Ralph S. "Rocky" Friedrich, that Petroplast's paston system technology could be valuable to Ameron's business.[13]

As a result of follow-up communications, Piatti arranged to meet with Friedrich and Petroplast's chief engineer, Daniel Aragones, at the Curitiba Plant on August 8, 2002.[14] During the visit for that meeting, Piatti permitted Friedrich to see Petroplast's design software and the entire paston system.[15]

After Friedrich's return to the United States, he and Piatti exchanged a series of emails, which, according to Plaintiffs, form the basis of the contractual relationship

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11 *Id*. ¶¶ 1, 3, 13.

12 *Id*. ¶ 14; *see* D.I. 157, Aff. of Joseph L. Ruby in Supp. of PMSJ ("Ruby Aff."), Ex. C, Dep. of Gordon Robertson ("Robertson Dep."), at 52-53.

13 Robertson Dep. 53.

14 Piatti Aff. ¶ 18.

15 *Id*.

between the parties from which this action arises. The following is a summary of the emails that figure most prominently in the parties' respective theories of this case.

On August 27, 2002, Friedrich emailed Piatti, thanking him for hosting his visit to Curitiba and proposing a "one time technology fee of $20,000" in exchange for seven items listed in the body of the email. Those items included, for example, "Excel software for designing the pipe and predicting material and labor plus pipe performance."[16] Friedrich mentioned that Ameron already had developed much of the material he requested from Piatti, but suggested that Petroplast's data and information would accelerate Ameron's internal development program.[17] Friedrich also stated that "as part of the proposed technology sharing program, we [*i.e.*, Ameron] will also share all our test data with you as we proceed in our own development and qualification program."[18] On August 29, Piatti sent an email to Friedrich, thanking him for his visit to Brazil and his proposal of August 27.[19] Piatti's email stated that "[i]n general terms, your offer is quite interesting regarding the seven points that you explain. We agree with them all."[20] Piatti then requested that the parties negotiate a noncompetition agreement in "South-American countries that [Petroplast] presently suppl[ies]," and stated that Petroplast's "main

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16 D.I. 161, 163, Aff. of G. Warren Bleeker in Supp. of DMSJ ("Bleeker Aff."), Ex. 5 at PETRO-00004.

17 Bleeker Aff. Ex. 5 at PETRO-00004.

18 *Id*.

19 *Id*. at PETRO-00005

20 *Id*.

interest in an association with Ameron was to establish "a two-way technological cooperation."[21] Finally, he made a counteroffer of a one-time technology fee of $50,000.[22]

After trading a few short emails without much substance, Friedrich responded to Piatti on September 5 (the "September 5 Email") by making a "counter proposal" that included a payment of $25,000, subject to approval by Ameron management.[23] In support of his counterproposal, Friedrich asserted that the "data we [*i.e.*, Ameron] would provide you [*i.e.*, Petroplast] from our long term testing and qualification program with the agencies of the United States could easily exceed the value of the technology [to be received from Petroplast]."[24] The September 5 Email also stated that Ameron would "share all our test data and any manufacturing improvements we learn along the way with you . . . ."[25]

The next day, on September 6, 2002, Piatti responded, saying "[i]t's okay for us. We'll make a bet for the long term" (the "September 6 Email").[26] On September 9,

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21 *Id*.

22 *Id*.

23 *Id*. at PETRO-00006.

24 *Id*.

25 *Id*.

26 Bleeker Aff. Ex. 5 at PETRO-00007. Piatti also discussed making arrangements to accommodate Ameron's engineers regarding a follow-up visit to Petroplast's facilities. *Id*.

Friedrich thanked Piatti for "accepting the offer."[27] Friedrich cautioned Piatti, however, that he still needed to get corporate approval before he officially could sign off on a deal with Petroplast. The following day, Piatti suggested that he and Friedrich work together to reduce their agreement to written form "to use it as a guide . . . and frame for the relationship [between the parties]."[28]

In a September 20 email, Friedrich notified Piatti that Ameron had approved the funds needed to commence the technology-sharing relationship (the "September 20 Email").[29] Friedrich undertook to arrange for Ameron to issue a purchase order for a "one time technology transfer,"[30] and proposed a two-step process for the transaction. As part of the first step, Ameron would send a purchase order to Petroplast and, upon receipt, Petroplast would send to Ameron six enumerated categories of information in advance of Ameron's representatives' trip to Petroplast's plant in Argentina.[31] After Ameron

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27 *Id*. at PETRO-00007.

28 *Id*.

29 Bleeker Aff. Ex. 5 at PETRO-00008.

30 *Id*. Friedrich inquired as to whom the purchase order should be sent. *Id*. ("I am assuming the PO will be issued to Petrofisa, but maybe you prefer Petroplast S.A. Please let me know.").

31 *Id*. These categories included: (1) "[a] copy of the Excel software for designing the pipe and predicting material and labor usage, plus pipe performance"; (2) "[a] a copy of all Material Specifications plus names and addresses of [Petroplast's] suppliers"; (3) "[d]etail drawings/sketches of the sand mixing and dispensing equipment"; (4) "[w]ritten process description"; (5) "[p]lans for any improvement in the process that [Petroplast] [has] learned, but may not have yet implemented"; and (6) "[c]opies of all test reports and the ability to share that data with agencies in the United States." *See id*.

received that information, it would pay Petroplast $15,000. As to the second step, Ameron would visit the Petroplast plant and pay the balance of the money owed to Petroplast, or $10,000.[32] Friedrich indicated that Ameron also would provide certain information to Petroplast in the exchange. For example, he explained that upon receipt of Petroplast's Excel software, Ameron "will use this software to compare to our own prediction models and refine our models accordingly if necessary. We will share our own model with [Petroplast] when it is complete."[33] In addition, he stated that "Ameron will share all our own test data and reports, developed during our own testing and development program, with [Petroplast] as they become available. This will include data for strain corrosion testing, 'Green Book' specified 'pickle jar' and 'accelerated/strain aging' testing for local agencies in the United States."[34] After describing these terms, Friedrich stated in the September 20 Email that "[i]f the above terms and conditions are acceptable, please let me know, so I can issue the Purchase Order."[35]

That same day, Piatti advised Friedrich that Petroplast would begin putting together the documentation Friedrich specified in his email and would continue to make

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32 *Id*.

33 *Id*.

34 *Id*.

35 *Id*. at PETRO-00009.

arrangements for Ameron's visit to Argentina.[36] For the sake of brevity, in discussing Plaintiffs' contention that this series of emails forms the basis for an enforceable contract, I refer to them collectively as the "Emails."

3. Ameron issues the Purchase Order[37]

While it remains unclear precisely when the Purchase Order ("PO") was issued, the parties agree that Ameron issued it shortly after Piatti and Friedrich's email exchange on September 20.[38] Because the document figures prominently in both parties' arguments, I briefly summarize key parts of it below.

The PO is a three-page document. The first page is the front side of an Ameron purchase order form which indicates that Ameron is paying Petroplast $25,000 in exchange for the information listed in Appendix A of the order.[39] The second page, entitled "Purchase Order Terms and Conditions," is on the reverse side of the form and contains boilerplate terms and conditions. Appendix A, the third and final page of the PO, contains the specific terms of the exchange.[40] In particular, this page lists six classes

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36 *Id*. Piatti also stated that "[a]s Petroplast is the owner of the technology [sought by Ameron], [he would] prefer" the money to be issued to Petroplast and not Petrofisa. *Id*.

37 D.I. 162-63, Aff. of Ralph Friedrich in Supp. of DMSJ ("Friedrich Aff.") Ex. 1, the Purchase Order ("PO").

38 Ameron contends that it sent the PO to Piatti on or about October 4, 2002. Friedrich Aff. ¶ 7; PMSJ AB 17. Plaintiffs assert that Piatti received it, via DHL, on or about October 11, 2002. Piatti Aff. ¶ 18; DMSJ AB 9.

39 PO at A003474.

40 *Id*. at A003478.

of information Petroplast would transfer to Ameron, as well as Ameron's obligations to Petroplast.[41] While these six categories differ slightly from the six categories recited in Friedrich's September 20 Email, the content of each of the corresponding categories in the PO and the September 20 Email are substantially similar. For example, category one of the PO requires Petroplast to furnish to Ameron a copy of its "Qua[t]tro Pro software," as opposed to the "Excel software" referred to in the September 20 Email, but Ameron's undertaking to "use [the] software to compare to its own prediction models . . . [and] furnish Petroplast with its model when it is completed" remains.[42] Similarly, Ameron's undertaking to "furnish Petroplast with copies of Ameron's test data and reports resulting [from] its testing and development program" appears in both documents.[43]

4. The May 23 Email

On May 22, 2003, Piatti emailed Friedrich seeking to clarify Petroplast's relationship with Ameron because he perceived, based on Ameron's conduct over the previous few months, a lack of receptiveness to his questions and inquiries regarding

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41 Appendix A states, for example, that Petroplast represented to Ameron that it "has full and exclusive ownership rights to the technology which is the subject of [the PO] . . . as well as the right to grant to Ameron non-exclusive perpetual right to use such technology." *Id*.

42 *Id*.; *compare* Friedrich Aff. Ex. 5 at PETRO-00008.

43 PO at A003478. As in the September 20 Email, the PO indicates that the parties "expected [such test data and reports] to include data for strain corrosion testing, 'Green Book' specified 'Pickle Jar' and 'Accelerated Strain Aging' testing for local agencies in the United States." *Id*. According to Friedrich, these types of tests are used by the City of Los Angeles in analyzing whether a piping project should receive municipal approval. *See* D.I. 158, Dep. of Ralph Friedrich ("Friedrich Dep."), at 556-57.

their business relationship.[44] Essentially, Piatti sought clarification as to the kind of relationship and cooperation the parties would have going forward. In an email reply later that day, Friedrich apologized for not being more responsive and for failing to keep Piatti updated.[45] He further explained that it "has always been [his] intent to establish a two way communication of knowledge learned in sand core pipe between Petroplast and Ameron," but he did not have authority to discuss the parties' "business relationship or joint venture, etc."[46] Friedrich told Piatti that Ameron had run "lots of tests" but did not have any "formal reports" that it could send to Petroplast at that time.[47] He explained that Ameron is "spending so much time trying to learn quickly and make test pipe, [that it is] not having much time to write reports that [Ameron] can send to you."[48] Friedrich also offered to send additional data to Petroplast and invited Piatti to visit Ameron's R&D facility.

In response, on May 23, 2003, Piatti sent an email to Friedrich (the "May 23 Email") that Ameron relies on heavily as clarifying the scope of its obligations to Petroplast. In the email, Piatti acknowledged Friedrich's busy "working rhythm" and

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44 Bleeker Aff. Ex. 5 at PETRO-00021.

45 *Id*. at PETRO-00022 (Friedrich noted that he had a busy travel schedule and often "gets behind").

46 *Id*. (Friedrich expressed a willingness to answer questions and discuss issues with Piatti whenever possible).

47 *Id*. Nevertheless, Friedrich did provide a "general update" by discussing briefly certain information pertaining to Ameron's sand core pipe work. *Id*.

48 *Id*.

stated that "there is no need to send reports or take time to prepare data in progress [for delivery to Petroplast]. Just, whenever you get to conclusions, share them with their fundamentals."[49]

5. Ameron claims it has performed its obligations

Ameron contends that, after entering into the agreement with Petroplast, it spent over six years attempting to obtain approval from the City of Los Angeles (the "City" or "LA") for its RPMP product, which was manufactured, in part, using Petroplast's sand application technique. On approximately January 22, 2009, the City granted Petroplast conditional approval for projects in the municipality.[50] The next month, Ameron produced to Petroplast approximately 1,600 pages of documents with the alleged expectation that its production would constitute full performance under the Agreement. In particular, Ameron produced test data and reports relating to a variety of matters and delivered its prediction model for labor and material usage and pipe performance.[51] Ameron also produced test data and reports relating to its conditional approval from LA, including "Green Book" qualification testing results, accelerated aging, strain corrosion, "Pickle Jar" chemical results, testing procedures, testing methods, survey reports, and a host of other information.[52]

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49 Friedrich Aff. Ex. 3.

50 *Id*. ¶ 11.

51 *See id*. ¶ 12.

52 *See id*. ¶ 13 & Ex. 4.

Importantly, Ameron took the position that this production "fulfilled [all of] its duties under the Agreement" with Petroplast.[53] Indeed, Ameron contends that Piatti's May 23 Email required only that it apprise Petroplast of its conclusions and fundamentals relating to Ameron's anticipated approval from the City of LA, and nothing more. Moreover, Ameron asserts that the first "conclusion" relating to such approval by the City came in the form of Ameron's conditional approval in 2009.[54] Ameron apparently cites these reasons, among others, as justifying its failure to produce other significant information regarding test data, reports, and analyses it allegedly developed at other times.[55]

6. Petroplast accuses Ameron of not honoring its obligations under the agreement

Petroplast vigorously disputes both the nature and scope of Ameron's production obligations under the parties' agreement. In particular, Petroplast contends that Ameron's obligations covered the production of information relating to much more than just approvals from the City of LA.

In that regard, Petroplast has identified various items it claims Ameron should have given it during the years between the time the parties reached their accord in or around October 2002 and the filing of this litigation in January 2009. For example, Petroplast argues that Ameron should have produced to it, at various junctures,

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53 *Id*. ¶ 13.

54 Ruby Aff. Ex. K at Supp. Resp. to Interrog. 31.

55 *See* Piatti Aff. ¶ 33.

information relating to: the benefits of using steeper wind angles; more accurate modulus of elasticity data; long-term HDB test data; the use of weft tape; the benefits of laminate plate theory; Ameron's Excel software; Ameron's MathCAD software; and a litany of other information.[56] Petroplast further argues that, during this time, Ameron made a number of representations "designed to persuade Plaintiffs that it was having difficulty developing its product" and that it thereby affirmatively concealed the fact that it possessed information that it owed to Plaintiffs.[57]

7. Unbeknownst to Petroplast, Ameron acquires Polyplaster

After several years of waiting for Ameron's information, Petroplast claims that it concluded that Ameron was not going to honor its part of the contract. It allegedly formed this belief in October 2007 when it learned of Ameron's public announcement that it had completed an acquisition of Polyplaster, Ltda. ("Polyplaster").[58] Polyplaster is a privately-owned fiberglass manufacturer located in Betim, Brazil. More importantly, it is a direct competitor of Petroplast in the sewer and water pipe industries.[59] According to Piatti, Petroplast had no prior warning of this acquisition, but later learned that Ameron's

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56 *See*, *e.g.*, PMSJ OB 19-20; DMSJ AB 27-28.

57 DMSJ AB 14. As discussed in greater detail *infra*, the parties submitted voluminous briefing rife with material issues of fact. For purposes of the pending cross motions for summary judgment, it is not necessary to give a comprehensive account of the items that Petroplast avers it is owed. Rather, I address them only to the extent they are relevant to my rulings under Rule 56(d) below.

58 *See* Piatti Aff. ¶ 32.

59 Friedrich Dep. 391-92.

negotiations to purchase Polyplaster began in early 2003, right after the parties to this litigation entered into their agreement.[60] After the Polyplaster acquisition, the degree of communication between the parties diminished markedly.[61]

8. The Tolling Agreement

Eventually, Petroplast advised Ameron that it believed Ameron had materially breached their agreement. On or about September 8, 2008, Petroplast and Ameron entered into a Standstill & Tolling Agreement (the "Tolling Agreement"), which, among other things, tolled any defenses based on the passage of time that either party might assert, including defenses based on a statute of limitations from that date.[62] The Tolling Agreement expressly preserves, however, any such defenses of any party that existed as of September 8, 2008.[63]

C. Procedural History

On January 22, 2009, Petroplast filed its original complaint in this action asserting five counts against Ameron based on the information-sharing relationship the parties allegedly entered into in 2002 or 2003. On February 18, 2009, Ameron filed a Motion to Stay, or in the Alternative, for Judgment on the Pleadings. The motion sought a stay on the grounds of *forum non conveniens* based, in part, on a related action filed in a

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60 Piatti Aff. ¶ 32; Friedrich Dep. 383.

61 Ruby Aff. Ex. K at Supp. Resp. to Interrog. 31.

62 Friedrich Aff. Ex. 5, the Tolling Agreement, §§ 1-6. This agreement is governed by California law. *Id*. § 9.

63 *Id*. § 3.

California court. Alternatively, Ameron sought judgment on the pleadings as to four of the five counts against it. In an October 28, 2009 Memorandum Opinion, I denied the motion to stay because Ameron failed to show that it would suffer overwhelming hardship if this action were allowed to continue in Delaware. I also denied Ameron's request for judgment on the pleadings.[64]

The parties then engaged in extensive discovery. On October 6, 2010, Petroplast moved to amend its complaint to include Petrofisa as a plaintiff. I granted that motion on November 16, 2010 and Petroplast filed its Amended Complaint (the "Complaint") on November 30. The Complaint contains five counts and asserts claims for: (1) breach of contract; (2) violation of the California Uniform Trade Secrets Act ("CUTSA"); (3) conversion; (4) unjust enrichment; and (5) misappropriation.[65]

On January 7, 2011, Petroplast moved for partial summary judgment on Count 1. That same day, Ameron filed its own motion for summary judgment or partial summary judgment. During the course of briefing, Petroplast withdrew two of its five counts, namely, those for unjust enrichment and conversion.[66] This Memorandum Opinion constitutes my rulings as to the parties' competing motions for summary judgment on the remaining claims.

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64 *See* D.I. 35; *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009).

65 Compl. ¶¶ 89-124. Petrofisa joins with Petroplast in asserting only the breach of contract claim against Ameron.

66 DMSJ AB 1 n.1.

D. Parties' Contentions

Because the parties dispute just about every detail in this case, I begin by describing their positions regarding summary judgment in only the broadest terms. Plaintiffs seek partial summary judgment as to their breach of contract claim based on their contention that there are no genuine issues of material fact regarding Ameron's liability under Count I. Specifically, they argue that: Petroplast and Ameron entered into an unambiguous and binding agreement; Petrofisa was a third-party beneficiary of that agreement; Petroplast performed its obligations under it; and Ameron breached the agreement by failing to provide certain information the agreement required it to provide.

In its motion for summary judgment, Ameron asserts that it fully performed its obligations under the plain language of the alleged agreement. According to Ameron, that agreement required only that it provide to Plaintiffs a completed prediction model and test data and reports relating to municipal approval from the City of LA. Ameron further avers that, even if it did not fully perform its contractual obligations, it has a number of defenses to enforcement, including the statute of limitations, estoppel, and lack of provable damages. In addition, it seeks summary judgment on Plaintiffs' trade secrets and common law misappropriation claims, arguing that the record contains insufficient evidence to support those counts.

II. ANALYSIS

A. Standard for Summary Judgment

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[67] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[68] Summary judgment may be denied if the legal question presented needs to be assessed in the "more highly textured factual setting of a trial"[69] or the court "decides that a more thorough development of the record would clarify the law or its application."[70]

Under Rule 56(h), **"**[w]here the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." Here, the parties have cross-moved for summary judgment on various issues, but it is clear from the record and the parties' substantial filings that there are multiple disputed issues of material fact. Thus, I do not consider the motions to be a stipulation for a decision on the merits based on the existing record.

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67 *Twin Bridges Ltd. P'rship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

68 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

69 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

70 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

Even where a number of issues of material fact prevent a court from granting a motion for summary judgment, however, it may, pursuant to Rule 56(d), clarify which issues remain for trial.[71] In particular, the court may determine which facts in the record are without substantial controversy and "[u]pon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."[72]

In this case, the parties' summary judgment briefing was saturated with issues of material fact relating to virtually all of the claims and defenses they asserted. For that reason, I have concluded that both motions should be denied. But, pursuant to Rule 56(d), I have determined that a small number of issues are without substantial controversy. To the extent indicated in this Memorandum Opinion, those issues and the underlying facts will be deemed established at trial. As to the other issues, I have not attempted to address them specifically because they require a more thorough development of the facts through a trial.

B. Issues to be clarified for trial

1. Is there a valid, enforceable contract between the parties?

The parties essentially agree that there is an enforceable contract between them, but disagree vigorously as to its form and content. Plaintiffs contend that the contract is comprised of the Emails between Friedrich and Piatti in late 2002. Specifically, they assert that the "emails of September 6 and 20, 2002 . . . constitute a clear offer and

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71 *Clark v. Packem Assocs.*, 1991 WL 153067, at *6 (Del. Ch. June 6, 1991).

72 *Cephalon, Inc. v. Johns Hopkins Univ.*, 2009 WL 4896227, at *7 (Del. Ch. Dec. 18, 2009) (citing Ct. Ch. R. 56(d)).

acceptance, and performance began promptly thereafter."[73] Ameron, on the other hand, dismisses those emails as merely expressing goals and expectations and containing rejected offers and counteroffers that preceded a written contract. Rather, Ameron contends that the PO, and the PO alone, reflects the parties' agreement.[74]

I cannot decide at this preliminary stage whether the contract takes the form of the Emails or the PO, or some combination of those documents. In any event, the terms of the agreement allegedly resulting from the Emails and the PO, respectively, are ambiguous and highly controverted. As such, and with a few exceptions discussed below, it is not possible to decide the precise bounds of the alleged contract on summary judgment. These issues are too heavily fact-laden and require the nuance of trial. Thus, for purposes of trial, the existence of a valid and enforceable contract between the parties shall be deemed established, but the form and content of that contract remains to be determined.[75]

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73 PMSJ OB 17.

74 PMSJ AB 1 ("the only agreed-upon terms [between the Parties] are those set forth in the Purchase Order Agreement.").

75 I note that the PO provides that California law should govern its construction. *See* PO ¶ 21. The parties agree that California law should govern the contractual issues raised in the Complaint, regardless of whether the contract takes the form of the PO or the Emails. *See* PMSJ OB 15; DMSJ OB 30-31. Therefore, I apply California law in examining and attempting to construe the language of the documents relevant to the contract issues.

2. Is Ameron's obligation as to "test data and reports" limited to information pertaining to the City of LA?

The parties base their dispute over the terms of the alleged agreement on differences between the language of the Emails and that of the PO.[76] To this end, I note that many parts of these documents are ambiguous and engender genuine issues of material fact. One exception involves the language governing Ameron's obligation to provide "test data and reports," which does not vary materially between the Emails and the PO. In the September 20 Email, Friedrich wrote that:

> Ameron will share all our own test data and reports, developed during our own testing and development program, with [Petroplast] as they become available. This will include data for strain corrosion testing, "Green Book" specified "pickle jar" and "accelerated/strain aging" testing for local agencies in the United States.[77]

The PO similarly requires Ameron to:

> furnish Petroplast with copies of Ameron's test data and reports resulting [from] its testing and development program. This is expected to include data for strain corrosion testing, "Green Book" specified "Pickle Jar" and "Accelerated Strain Aging" testing for local agencies in the United States.[78]

Both documents require Ameron to provide to Petroplast certain test data and reports generated from Ameron's own testing and development program. Ameron

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76 *See, e.g.*, PMSJ OB 18 ("there is no material difference between the emailed terms and the Purchase Order terms of the contract."); PMSJ AB 19 ("The terms of the Purchase Order Agreement differ materially from those contained in the email correspondence between the parties.").

77 Bleeker Aff. Ex 5 at PETRO-00008.

78 PO at A003478.

argues, however, that this obligation, under either set of operative documents, is limited to test data and reports relating to the City of LA's approval process. As support, Ameron relies, in part, on the fact that relevant contractual language refers to LA-specific tests, such as "Pickle Jar." Plaintiffs counter that the plain language of either set of documents directly contradicts Ameron's interpretation. They argue, instead, that Ameron's obligation relates to test data and reports pertaining to its testing and development programs generally, and is not limited to the City of LA.

In interpreting a contract under California law, a court must give effect to the "mutual intentions" of the parties at the time the contract was formed based on the language of the contract.[79] Contract provisions are interpreted in their "ordinary and popular" sense, unless such a provision is ambiguous.[80] "A [contract] provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable."[81] Moreover, "[i]f the court decides . . . that the language of a contract, in the light of all the circumstances, is 'fairly susceptible of either one of the two interpretations contended for[,]' . . . extrinsic evidence relevant to prove either of such meanings is admissible."[82]

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79 *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1212 (Cal. 2003).

80 *Id.* at 1213.

81 *Id.*

82 *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645-46 (Cal. 1968) (internal citations omitted).

Based on the plain language of the September 20 Email and the PO, I agree with Plaintiffs' interpretation; Ameron's "test data and reports" obligation is not limited to the City of LA. First, the City is not expressly mentioned in any version of the purported contract. Second, while these versions refer to LA-specific tests, they do so using nonexhaustive terms of inclusion. Although all of the relevant language indicates that the parties contemplated *including* test data pertaining to the City of LA, there is no language in the various documents reflecting a specific intent to limit Ameron's obligation to the enumerated LA-specific tests. Indeed, both the Emails and the PO refer to requiring Ameron to provide data and reports regarding "local agencies in the United States." This language directly and unambiguously contradicts Ameron's claim that its obligation to produce data and reports applied only to data and reports relating to the City of LA. There is no evidence, either in the Emails or PO, that plausibly supports Ameron's proposed limitation. Therefore, it will be deemed an established fact at trial that Ameron's test data and reports obligation under the parties' contract, in whichever form it takes, is not limited to data and reports concerning the City of LA.

3. Did the May 23 Email constitute a modification of Ameron's obligations?

Next, I address Ameron's claim that the May 23 Email from Piatti constituted a valid and enforceable modification of Ameron's obligation to provide test data and reports to Petroplast. Specifically, Ameron asserts that Piatti modified the parties' agreement, in whatever form it takes, when he told Friedrich on May 23, 2003 that "there is no need [for Ameron] to send reports or take time to prepare data in progress [for delivery to Petroplast]. Just, whenever you get to conclusions, share them with their

fundamentals."[83] Ameron also argues that even if the May 23 Email is not a modification, Plaintiffs are equitably estopped from claiming that Ameron breached the parties' agreement by adhering to Piatti's instructions in that Email. Plaintiffs respond that Ameron's claim that the contract was modified is wrong as a matter of law because the May 23 Email does not bear any of the indicia of a new contract as required under California law. They also challenge Ameron's reliance on equitable estoppel on the ground that Ameron cannot meet the requirements for asserting that doctrine.

Pursuant to CALIFORNIA CIVIL CODE § 1698(a), "[a] contract in writing may be modified by a[nother] contract in writing."[84] The essential elements of a contract are parties with capacity, who consent to a lawful object, and exchange sufficient consideration.[85] Thus, California courts hold that a modification ordinarily must be supported by new consideration.[86]

Here, regardless of how the Court might construe Piatti's words in the May 23 Email or their import, it is undisputed that Ameron did not give Petroplast any new

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83 Friedrich Aff. Ex. 3.

84 CAL. CIV. CODE § 1698(a); *Major v. W. Home Ins. Co.*, 87 Cal. Rptr. 3d 556, 568 (Cal. Ct. App. 2009); *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123, 133 (Cal. Ct. App. 1984) ("The California Supreme Court has interpreted the language of section 1698 literally, holding that an executory written modification must meet the requirements of a valid contract.").

85 *See* CAL. CIV. CODE § 1550.

86 *Major*, 87 Cal. Rptr. 3d at 568; *Motown Record Corp.*, 160 Cal. App. 3d at 133; *Post v. Palpar, Inc.*, 7 Cal. Rptr. 823, 826 (Cal. Ct. App. 1960) ("to enforce any modification to a contract such as an extension of time, there must be an additional consideration to support the modifying contract.").

consideration for Piatti's supposed modification. Therefore, under the plain terms of § 1698(a), the May 23 Email is not a legally enforceable modification of any of the terms in the parties' original agreement, including Ameron's obligations to provide test data and reports.

In the alternative, Ameron invokes the doctrine of equitable estoppel to prevent Plaintiffs from arguing that Ameron breached its obligations to deliver to Petroplast test data and reports. In that regard, Ameron contends that it complied with Piatti's instructions in the May 23 Email by waiting until the completion of the LA approvals to deliver its data and reports. I cannot resolve this issue on summary judgment, however. Estoppel is a legal theory which "employs equitable principles to satisfy the requirement that consideration must be given in exchange for the [a] promise [or representation] sought to be enforced."[87] To come within the doctrine, Ameron would need to prove that: (1) Petroplast made a clear and unambiguous promise or representation; (2) Ameron relied on it; (3) Ameron's reliance was reasonable and foreseeable; and (4) Ameron was injured by such reliance.[88]

Determining whether Ameron has met these elements will require the Court to consider one or more disputed issues of material fact. But, resolution of those issues must await additional factual development. One example relates to Plaintiffs' claim that

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87 *See US Ecology, Inc. v. State*, 28 Cal. Rptr. 3d 894, 905 (Cal. Ct. App. 2005) (internal citations and quotation marks omitted).

88 *See id*.

Ameron was obligated to provide information beyond "conclusions" and "fundamentals." In the circumstances of this case, the meaning of those terms is ambiguous and remains to be litigated.

4. Is Petrofisa a third-party beneficiary of the agreement between Petroplast and Ameron?

Petroplast argues that, if it prevails on its breach of contract claim against Ameron, Petrofisa also may recover contract damages because Petrofisa is a third-party beneficiary ("TPB") of the agreement between Petroplast and Ameron. In particular, Petroplast contends that the language of the parties' email communications and the circumstances under which they entered into their agreement demonstrate that Ameron knew Petroplast intended to benefit Petrofisa under the agreement. Ameron disputes that proposition. It asserts that the proper test for evaluating TPB status under California law is to examine the language of the relevant contract and determine whether it evinces an intent to benefit a third party. Under this rubric, Ameron argues that the language of the PO, which it avers is the relevant contract, does not reflect any intent to confer a benefit upon Petrofisa. Therefore, Ameron claims it is entitled to summary judgment on this point.

CALIFORNIA CIVIL CODE § 1559 provides that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Under this statute, to determine whether a person is a TPB of a contract, a court must evaluate whether the party seeking to establish TPB status can show that the terms of the contract at issue expressly evince an intent to benefit a third

person.[89] It is insufficient merely to show that a third party would benefit incidentally from performance of the contract.[90]

To qualify for TPB status under § 1559, a person need not be named specifically as a beneficiary in the contract. Rather, "[a]ll that section 1559 requires is that the contract be made expressly for the benefit of a third person, and expressly simply means in an express manner; in direct or unmistakable terms; explicitly; definitely; directly."[91] Indeed, California courts interpret the term "expressly" as meaning the negative of "incidentally."[92] As such, "there is no requirement that both of the contracting parties must intend to benefit the third party"; rather, "it is sufficient that the promisor must have understood that the promisee had such intent."[93] In addition, "[n]o specific manifestation

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89 *See, e.g., Souza v. Westlands Water Dist.*, 38 Cal. Rptr. 3d 78, 88 (Cal. Ct. App. 2006); *Schauer v. Mandarin Gems of Cal., Inc.*, 23 Cal. Rptr. 3d 233, 239 (Cal. Ct. App. 2005).

90 *Souza*, 38 Cal. Rptr. 3d at 88.

91 *Martinez v. Socoma Cos.*, 521 P.2d 841, 850 (Cal. 1974) (internal citations and quotation marks omitted); *Schauer*, 23 Cal. Rptr. 3d at 239.

92 *Prouty v. Gores Tech. Gp.*, 18 Cal. Rptr. 3d 178, 184 (Cal. Ct. App. 2004).

93 *Spinks v. Equity Residential Briarwood Apts.*, 90 Cal. Rptr. 3d 453, 469 (Cal. Ct. App. 2009) (internal citations and quotation marks omitted); *Schauer*, 23 Cal. Rptr. 3d at 239. California has adopted § 302 of the Restatement (Second) of Contracts. *See, e.g., Prouty*, 18 Cal. Rptr. 3d at 187; *Lake Almanor Assocs., L.P. v. Huffman–Broadway Gp., Inc.*, 101 Cal. Rptr. 3d 71, 75 n.2 (Cal. Ct. App. 2009). It states, in pertinent part, that "(1) [u]nless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the

by the promisor of an intent to benefit the third person is required."[94] Therefore, a person will be deemed a TPB where the circumstances indicate that the promisee—here, Petroplast—intended to give the purported TPB—here, Petrofisa—the benefit of the performance called for in the contract and the promisor—here, Ameron—understood that the promisee had such an intent.[95]

Having carefully considered the record before me, I am persuaded that Petrofisa qualifies as a TPB of the agreement between Ameron and Petroplast, in whatever form it takes. While Petrofisa was not named in the PO, the circumstances surrounding the parties' agreement contain ample evidence indicating that Ameron understood that Petroplast intended to share with Petrofisa the benefits of the parties' bargain. In the September 20 Email, for example, Friedrich wrote that he assumed Ameron would issue the PO to Petrofisa, but inquired whether Piatti would prefer that it be issued to Petroplast.[96] In his response of even date, Piatti told Friedrich that he preferred to have Ameron issue the PO to Petroplast because it, and not Petrofisa, was the "owner of the technology" contemplated in the parties' negotiations.[97] This fact explains why

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circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 302 (1981).

94 *Schauer*, 23 Cal. Rptr. 3d at 239 (internal citations and quotation marks omitted).

95 *See Spinks*, 90 Cal. Rptr. 3d at 469; *Souza*, 38 Cal. Rptr. 3d at 88 ("In determining whether the contract contemplates a benefit to the third party, the court must read the contract in light of the circumstances in which the parties entered into it.").

96 Bleeker Aff. Ex. 5 at PETRO-00008.

97 *Id*. at PETRO-00009.

Appendix A of the PO refers to Petroplast and not Petrofisa. Specifically, Appendix A states that Ameron would issue the PO based on Petroplast's representation that it had "full and exclusive ownership rights to the technology which is the subject of" the PO.[98] Petrofisa did not have such ownership rights so there was no reason to mention it in that representation. In addition, both Robertson and Friedrich visited with representatives of Petroplast, including Piatti, during their trips to Petrofisa's facilities in 2002 to view and discuss Petroplast's paston system.[99] Finally, the record reflects that several Ameron employees made no apparent distinction for business purposes between Petroplast and Petrofisa when, on behalf of Ameron, they were negotiating an agreement with Piatti and Petroplast.[100]

In sum, the circumstances surrounding the parties' agreement indicate that Ameron understood that Petroplast intended that it and Petrofisa would share in the benefit of Ameron's promised performance. As such, it is of no moment under California law that Petrofisa was not named in the PO. Thus, I hold under Rule 56(d) that Petrofisa qualifies as a TPB of the agreement between Ameron and Petroplast and, to that extent, grant Plaintiffs' motion for summary judgment as to this issue.

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98 PO at A003478.

99 *See* Piatti Aff. ¶¶ 14, 18; Robertson Dep. 8-9, 52-53.

100 *See* Friedrich Dep. 180-81; D.I. 157, Ruby Aff. Ex. E, Dep. of Ronald Ulrich, 147.

5. Did Ameron have a continuing obligation to provide Petroplast with information concerning "improvements" to Ameron's overall manufacturing process?

Plaintiffs contend that the contract between the parties obligated Ameron to supply information to Petroplast concerning improvements Ameron made to its manufacturing process. A key predicate of Plaintiffs' claim is that the Emails, and not the PO, constitute the enforceable contract in this case.[101] As discussed *supra*, this issue is far from settled. Yet, even if I assume for purposes of argument that the Emails are the contract, as Plaintiffs contend, I still would find that Ameron did not have a free-standing obligation to provide "improvements" information to Petroplast.

Plaintiffs' position depends primarily on this Court finding that Friedrich's September 5 Email to Piatti was an "offer" and Piatti's September 6 Email was an

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[101] DMSJ AB 37 (asserting that Ameron's obligation to provide information about improvements is found in its offer in the September 5 Email as accepted in Piatti's September 6 Email). Plaintiffs' claim that they were entitled to information pertaining to Ameron's improvements probably would fail if the PO is deemed to be the operative contract. The PO requires *Petroplast* to provide Ameron with "copies of plans for any improvement in its processes" but does not specify that this requirement is reciprocal. PO at App'x A. Indeed, the PO makes no mention of any separate requirement that Ameron provide to Petroplast information as to its improvements, and California law does not permit a court to add a term to a contract about which the contract is silent or specifies otherwise. *See Levi Strauss & Co. v. Aetna Cas. & Sur. Co.*, 237 Cal. Rptr. 473, 477 (Cal. Ct. App. 1986); *see also Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). In addition, the PO contains an integration clause, which arguably strengthens Ameron's argument that the parol evidence rule would bar consideration of prior email communications that may have discussed different obligations of the parties. PO at A003474 § 1. As discussed in the text, however, I need not resolve this issue to find that Ameron is entitled to summary judgment on Plaintiffs' improvements claim.

"acceptance" that resulted in a binding contract. They focus on Friedrich's statement in the September 5 Email that Ameron "will share all our test data and *any manufacturing improvements* we learn along the way with you as well."[102] Importantly, however, the parties never again mentioned Ameron's having undertaken an obligation of this sort in their subsequent email correspondence or, as discussed previously, the PO.[103]

Preliminarily, I note that I am skeptical about Plaintiffs' claim that the September 5 and 6 Emails constitute an offer and acceptance sufficient to form an enforceable contract. Under California law, "the failure to reach a meeting of the minds on all material points prevents the formation of a contract even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract."[104] The record reflects that Friedrich's September 5 Email was sent as part of a back-and-forth negotiation process with Piatti about the nature and scope of the parties' proposed technology transfer. While Piatti responded to that email on September 6 by saying

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102 *See* DMSJ AB 37; Bleeker Aff. Ex. 5 at PETRO-00006 (emphasis added).

103 In fact, Friedrich's September 20 Email, which proposes how the parties would exchange their respective consideration and suggests memorializing that in a purchase order, is substantially similar to Appendix A of the PO. Neither document specifies that Ameron owes to Petroplast a free-standing duty to supply information about improvements it learned after implementing Petroplast's technology. *See* Bleeker Aff. Ex. 5 at PETRO-00008. Rather, like the PO, its plain language specifies that Petroplast had a nonreciprocal duty to supply process improvements information to Ameron.

104 *Banner Entm't, Inc. v. Super. Ct. (Alchemy Filmworks, Inc.)*, 72 Cal. Rptr. 2d 598, 604 (Cal. Ct. App. 1998) (emphasis in original omitted); *see also Bustamante v. Intuit, Inc.*, 45 Cal. Rptr. 3d 692, 704 (Cal. Ct. App. 2006).

"[i]t's okay for us[,] [w]e'll take a bet for the long term," and Friedrich responded on September 9 by thanking Piatti for "accepting the offer," it is dubious that the September 5 Email contained all of the material terms of the parties' bargain sufficient to find that a contract was formed via the September 5 and 6 Emails. The September 5 Email, for example, contained a list of six items, five of which were "comments" by Friedrich explaining why Ameron believed it should pay a lower technology fee to Petroplast. Only one item purported to list material terms of the bargain—namely, that Ameron would pay a $25,000 fee and share "improvements" learned along the way.

In any event, I need not resolve this issue because even if the September 5 Email constitutes Ameron's offer, I find that Friedrich's promise to share "improvements" is so vague and indefinite as to be unenforceable under California law. Where a contract is so uncertain and vague that the parties' intentions with respect to material terms of their agreement cannot be judicially ascertained, the contract is unenforceable.[105] "To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages."[106] If a contract does not provide a basis for

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105 *See Amaral v. Cintas Corp. No. 2*, 78 Cal. Rptr. 3d 572, 599-600 (Cal. Ct. App. 2008); *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (Cal. Ct. App. 1998) ("A proposal cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.") (internal quotation marks omitted); *Ladas v. Cal. State Auto. Ass'n*, 23 Cal. Rptr. 2d 810, 814-15 (Cal. Ct. App. 1993).

106 *Ladas*, 23 Cal. Rptr. 2d at 814-15; *see also Bustamante*, 45 Cal. Rptr. 3d at 699.

determining the obligations to which the parties agreed so that a court is unable to determine whether a counterparty has breached those obligations, "there is no contract."[107] In the September 5 Email, Friedrich stated that Ameron would share "any manufacturing improvements" it learned "along the way." This language does not shed light on what might constitute an "improvement" within the meaning of the purported agreement or how a court could evaluate whether Ameron learned about it "along the way."

Moreover, because the term "improvement" is so vague, it is unclear what standard this Court could use to determine whether Ameron breached a purported duty to give that information to Petroplast. In contrast, Ameron's obligations under the parties' agreement to provide a completed prediction model and certain test data and reports are sufficiently concrete to provide a court a rational means to examine whether Ameron breached these obligations. As to the test data and reports, for example, both the September 20 Email and the PO make clear the type of information that term is "expected to include."[108] The purportedly free-standing "improvements" obligation has no such definition and contains no metrics this Court could use to determine whether Ameron breached it. This absence of a rational method for determining a breach weighs heavily against Plaintiffs' position.

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107 *Weddington Prods., Inc.*, 60 Cal. App. 4th at 811.

108 *See* PO at App'x A.

This does not mean, however, that Ameron necessarily had no obligation to provide information to Petroplast regarding improvements it made during the course of the parties' agreement. For even if Ameron did not have an independent obligation to provide information pertaining to manufacturing improvements, it likely was required to provide at least some information concerning improvements via its obligations to provide a completed prediction model and certain test data and reports. Those obligations presumably include the concept that Ameron would need to give Petroplast at least some information concerning the latest technological innovations, if any, it achieved when it integrated the paston system into its manufacturing process. That is, a completed prediction model and test data and reports resulting from Ameron's testing and development program very well may include some information about how it used the paston system to improve its own manufacturing process. It is not possible on the current record, however, to delineate the full scope of the informational duties regarding improvements Ameron may have in the context of its obligations to provide a completed prediction model and certain test data and reports to Plaintiffs. That determination will have to await a full trial on the merits.

For the reasons stated and subject to the qualification just described, I hold that Ameron is entitled to summary judgment on the improvements issue in the sense that Ameron was not required under either the Emails or the PO, as a stand-alone obligation separate and apart from its obligations to provide a completed prediction model and

certain test data and reports, to provide to Petroplast manufacturing "improvements," whatever that term means, that Ameron learned.[109]

6. Is Plaintiffs' prediction model claim barred by the statute of limitations?

Ameron argues that, under the relevant statute of limitations, Plaintiffs are time-barred from making their prediction model contract claim. The parties do not dispute that Ameron was required, under either the Emails or the PO, to provide a prediction model to Plaintiffs when that model was "completed." While the parties apparently disagree about exactly when it was "completed," they do not appear to dispute that, if the agreement is not limited to work regarding the City of LA, Ameron's model, which consisted of two different software applications, Quattro Pro and MathCAD, was completed no later than July 2005.[110] There also is no dispute that Ameron failed to provide its prediction model by that time.[111] Thus, Plaintiffs' cause of action for Ameron's alleged breach of contract

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109 *See Ladas*, 23 Cal. Rptr. 2d at 815; *see also Bustamante*, 45 Cal. Rptr. 3d at 700 (finding that the conditions for performance as to a purported contractual duty to "take all steps necessary to obtain adequate funding and to formally launch the company" were "fatally uncertain.")

110 Ameron contends that it had completed its prediction model as of June 2004. *See* DMSJ OB 15 ("Thus, as of June 2004, Petroplast knew that Ameron had completed its prediction models . . . and that Ameron had not yet provided its prediction models to Petroplast."); Tr. of Mar. 1, 2011 Arg. ("Tr.") 26-27 (according to Ameron's counsel, "both parties agree that the prediction model that Ameron used for the Houston project in 2004 was complete."). For their part, Plaintiffs assert that the Quattro Pro aspect of Ameron's model was completed in June 2004 and the MathCAD component "no later than" July 2005. *See* Tr. 30, 8-9.

111 *See* DMSJ OB 15; Tr. 8.

as to its prediction model obligation accrued no later than July 2005.[112] Nevertheless, the parties dispute whether the statute of limitations bars Plaintiffs' claim.

Preliminarily, I note that this is a court of equity. As such, the Court generally analyzes questions of time bars and undue delay under the doctrine of laches. The parties to this action, however, did not seriously address the issue of laches in their papers; instead, they formulated their arguments in terms of the relevant Delaware statute of limitations. Statutes of limitations and the doctrine of laches both serve as time bars to lawsuits, but, unlike a defense based on a statute of limitations, whether a plaintiff is time-barred by laches from proceeding on a claim does not turn on a specific time period.[113] Rather, laches bars a plaintiff from proceeding if he waited an unreasonable length of time before asserting his claim and the delay unfairly prejudiced the defendant.[114] To prevail on a laches defense, a defendant must prove that: (1) the

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112 *See Mullins v. Rockwell Int'l Corp.*, 936 P.2d 1246, 1251 (Cal. 1997) (the statute of limitations in a contract action does not begin to run until the breach in question has occurred); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, at *12 (Del. Ch. May 4, 2005) ("It is well-established law in Delaware that the statute of limitations begins to run at the time of the alleged wrongful act, regardless of whether the plaintiff is aware of the injury. An action for breach of contract accrues at the time of the alleged breach of the contract."); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) ("The general law in Delaware is that the statute of limitations begins to run, *i.e.*, the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action."), *aff'd*, 725 A.2d 441 (Del. 1999).

113 *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 7 (Del. 2009).

114 *CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *5 (Del. Ch. Jan. 28, 2011).

plaintiff had knowledge of his claim; (2) he delayed unreasonably in bringing that claim; and (3) the defendant suffered resulting prejudice.[115] "An unreasonable delay can range from as long as several years to as little as one month, but the temporal aspect of the delay is less critical than the reasons for it."[116]

In *Whittington v. Dragon Group, LLC*, the Supreme Court observed that while "statutes of limitations always operate as a time-bar to actions at law, they are not controlling in equity."[117] Specifically, the Court explained that:

> 'A statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches.' Where the plaintiff seeks equitable relief, however, the Court of Chancery applies the statute of limitations by analogy. Absent a tolling of the limitations period, a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches.[118]

In determining whether a statute of limitations should apply by analogy, this Court follows the rule that "the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with

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115 *Whittington*, 991 A.2d at 8.

116 *CNL-AB LLC*, 2011 WL 353529, at *5.

117 *Whittington*, 991 A.2d at 7-8. In this case, Plaintiffs have invoked this Court's equity jurisdiction by, for example, asserting claims for injunctive relief and specific performance. *See* Compl. at 21.

118 *Id*. at 9 (internal citations and quotations omitted).

analogous suits at law."[119] As the Supreme Court stated in *Whittington*, Delaware courts find that a legal claim is analogous to an equitable claim where "the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity."[120]

Here, because Plaintiffs' prediction model claim involves an alleged breach of contract, I consider the relevant limitations period for this type of claim. I am also mindful that in situations where a cause of action at law arises outside of Delaware but litigation is brought in Delaware, our courts look to Delaware's "borrowing statute" to determine the applicable limitations period.[121] The borrowing statute provides that:

> Where a cause of action arises outside of [Delaware], an action cannot be brought in a court of [Delaware] to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of [Delaware], or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.[122]

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119 *Id*. (internal quotation marks omitted).

120 *Id*. (internal citations and quotation marks omitted).

121 *See* 10 *Del. C.* § 8121; *VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, at *12 (Del. Ch. May 4, 2005) ("Where the law of two different states may apply to an action, Delaware courts apply the Restatement (Second) Conflict of Law to determine which state law applies. With respect to questions of which state's statute of limitations to apply, the courts are instructed by the Restatement to apply the statute of limitations of the forum. Thus, in this case, the court looks to the statute of limitations laws of Delaware.") (internal citations omitted).

122 10 *Del. C.* § 8121. As discussed previously, the parties agree that California law should govern contractual issues raised in the Complaint; therefore, I will apply California law in analyzing the merits of those claims. *See supra* note 75.

The limitations period for causes of action sounding in breach of contract is three years under Delaware law[123] and four years under California law,[124] where the cause of action allegedly accrued. Therefore, pursuant to Delaware's borrowing statute, I consider Delaware's shorter limitations period of three years to be the analogous statute of limitations for purposes of a laches analysis.

Plaintiffs did not file the original complaint in this action until January 22, 2009. Because the parties did not enter into the Tolling Agreement until September 2008, more than three years after Plaintiffs' cause of action accrued in July 2005, at the latest, Plaintiffs' prediction model claim presumptively is time-barred unless Plaintiffs can proffer a valid justification for failing to file suit on this claim before July 2008, the end of the analogous limitations period. Plaintiffs urge the Court to find that the limitations period here was tolled before the parties entered into the Tolling Agreement for two separate reasons. Specifically, they assert that, under Delaware law, the doctrines of inherently unknowable injuries and fraudulent concealment serve to defeat Ameron's position that their prediction model claims are time-barred.

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[123] 10 *Del. C.* § 8106(a) ("no action based on a detailed statement of the mutual demands . . . between parties arising out of contractual . . . relations, [and] no action based on a promise . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . ."); *Martinez v. Gastroenterology Assocs., P.A.*, 2005 WL 1953091, at *2 (Del. Super. July 5, 2005).

[124] CAL. CIV. PROC. CODE § 337 ("Within four years[:] An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code . . . ."); *Lee v. Fid. Nat'l Title Ins. Co.*, 115 Cal. Rptr. 3d 748, 761 (Cal. Ct. App. 2010).

According to the doctrine of inherently unknowable injuries, sometimes referred to as the "discovery rule," a statute of limitations will not run "where it would be practically impossible for a plaintiff to discover the existence of a cause of action."[125] A plaintiff bears the burden of demonstrating that he was "blamelessly ignorant" of both the wrongful act and the resulting harm.[126] Thus, if objective or observable factors exist to put the plaintiff on constructive notice that a wrong has been committed, he may not rely on the discovery rule to toll a limitations period.[127] Moreover, a statute of limitations will begin to run when the plaintiff discovers facts "constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery[] of such facts."[128]

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125 *In re Tyson Foods, Inc.*, 919 A.2d 563, 584-85 (Del. Ch. 2007); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998); *see also Moreno v. Sanchez*, 131 Cal. Rptr. 2d 684, 689 (Cal. Ct. App. 2003) (noting that "judicial decisions have declared the discovery rule applicable in situations where the plaintiff is unable to see or appreciate a breach has occurred. These sorts of situations typically involve . . . breaches of contract committed in secret."); *April Enters., Inc. v. KTTV*, 195 Cal. Rptr. 421, 432 (Cal. Ct. App. 1983) ("the discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.").

126 *In re Tyson Foods, Inc.*, 919 A.2d at 584-85.

127 *See id.*; *In re Dean Witter*, 1998 WL 442456, at *5.

128 *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (emphasis in original); *In re Tyson Foods, Inc.*, 919 A.2d at 585 ("no theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong. Even where a defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth, no sanctuary from the statute will be offered to the dilatory

Similarly, a statute of limitations may be tolled where a defendant fraudulently has concealed from a plaintiff facts necessary to put him on notice of a breach.[129] To toll a limitations period under this doctrine, a plaintiff must allege an "affirmative act of 'actual artifice' by the defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth."[130] As in the context of the discovery rule, however, a statute of limitations is tolled only until the plaintiff becomes aware of his rights or until he could have become aware by the exercise of reasonable diligence.[131] Thus, both the discovery rule and the doctrine of fraudulent concealment operate to toll a limitations period only until the plaintiff discovers that his rights under a contract have been violated or he is put on inquiry notice that a violation has occurred.[132]

Although the parties did not frame their arguments in terms of laches, Plaintiffs' justifications for setting aside the applicable limitations period implicitly reflect an

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plaintiff who was not or should not have been fooled.") (internal citations omitted).

129 *In re Tyson Foods, Inc.*, 919 A.2d at 584-85.

130 *Id*. at 585; *In re Dean Witter*, 1998 WL 442456, at *5 ("Unlike the doctrine of inherently unknowable injuries, fraudulent concealment requires an affirmative act of concealment by a defendant—an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry.").

131 *See In re Dean Witter*, 1998 WL 442456, at *5 ("Mere ignorance of the facts by a plaintiff, where there has been no such concealment, is no obstacle to operation of the statute [of limitations].") (internal quotation marks omitted); *see also Krahmer v. Christie's Inc.*, 911 A.2d 399, 407 (Del. Ch. 2006).

132 *See In re Tyson Foods, Inc.*, 919 A.2d at 585.

argument that their delay in bringing suit on the prediction model claim was not unreasonable under the circumstances. Whether Plaintiffs unreasonably delayed in filing suit relates to their ability to rely upon the discovery rule or the doctrine of fraudulent concealment, as well as to the existence of laches. Those issues, however, present questions of fact largely dependent upon the particular circumstances.[133] In this case, I find that whether Plaintiffs' delay was unreasonable and whether their prediction model claim is barred by either laches or the statute of limitations requires consideration of a number of disputed issues of material fact. Therefore, I deny Ameron's motion for summary judgment on that claim.[134]

7. CUTSA and misappropriation

The final issue I seek to clarify in light of the upcoming trial relates to Petroplast's noncontractual claim for violation of the California Uniform Trade Secrets Act ("CUTSA").[135] Petroplast contends that Ameron violated CUTSA because its paston system and related design software were trade secrets and Ameron improperly acquired

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133 *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 8-9 (Del. 2009).

134 While I make no determinations about the merits of Plaintiffs' assertions in support of their discovery rule and fraudulent concealment defenses to Ameron's position that their claim is time-barred, I am skeptical about their failure to commence this litigation sooner than they did. In the absence of affirmative misrepresentations to prevent Petroplast from learning the truth, a fact whose existence in the record is as yet unclear, common sense dictates that representatives of Petroplast should have been on notice to inquire as to the status of Ameron's model after a few years had gone by with no word from Ameron. This fact issue, however, will have to be developed at trial.

135 CAL. CIV. CODE § 3426-3426.11.

those trade secrets through the complained-of conduct in this action. Ameron seeks summary judgment on this issue for a number of reasons, including: (1) that Petroplast's paston system and related information was no longer a trade secret after Piatti and his team disclosed that information to Friedrich during his August 2002 visit to the Curitiba Plant; (2) Ameron did not improperly acquire that information; and (3) Petroplast's claim is barred by CUTSA's three-year statute of limitations. Thus, key issues for the Court include whether information relating to the paston system was a trade secret, whether it maintained its trade secret status despite Friedrich's 2002 visit, and whether Ameron improperly acquired that information.

A person may be liable for violating CUTSA where he "unlawfully acquires, discloses, or uses information that is a 'trade secret.'"[136] Putting aside momentarily the issue of whether the relevant information was and still is a trade secret under the statute, I note that Petroplast does not appear to argue that Ameron improperly used or disclosed information relating to the paston system. Rather, it argues that Ameron improperly acquired such information through misrepresentation. Petroplast argues, for example, that Ameron never intended to carry out its promise to provide test data, software, and other information to Petroplast under the parties' alleged agreement and, additionally, that Friedrich intentionally misled Petroplast into surrendering the information at issue

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136 *Forcier v. Microsoft Corp.*, 123 F. Supp. 2d 520, 528 (N.D. Cal. 2000) (quoting CAL. CIV. CODE § 3426.1).

for a "miniscule" $25,000.[137] Ameron, on the other hand, describes the $25,000 as part of a "one time technology transfer fee" that the parties negotiated so that Ameron could lawfully acquire information relating to the paston system. Furthermore, Ameron disputes Petroplast's allegations that it had no intention of complying with the parties' bargain and that its management was never made aware of a need to supply information to Petroplast in exchange for the paston information. As to the latter point, Ameron emphasizes that its management approved the PO, which expressly recites that requirement.

These positions demonstrate that the parties genuinely dispute the nature and import of their dealings and the conduct that led to Ameron's acquisition of the paston system information at issue.[138] In particular, the parties dispute, among other things, what Friedrich communicated to Ameron management about the nature and scope of the bargain he and Piatti contemplated and whether he made material misrepresentations to Piatti during and around his visit to Curitiba in August 2002 in order to obtain the desired

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137 *See* DMSJ AB 40-41. Petroplast also avers that, despite Friedrich's representations to the contrary, Ameron never intended to share its design software. *Id*. at 42.

138 Similarly, Ameron is not entitled to summary judgment on its affirmative defense that the relevant statute of limitations bars Petroplast's CUTSA claim. Apart from the fact that the relevant analysis on this issue must begin with laches, *see* Part II.B.6 *supra*, Ameron's limitations defense raises material issues of disputed fact relating to when a potential CUTSA claim would have accrued in favor of Petroplast and when Petroplast had actual or inquiry notice of the accrual of such claim. Therefore, none of the parties is entitled to summary judgment on that defense.

paston information virtually for free. As such, I find that resolution of the propriety of Ameron's acquisition of Petroplast's technology would require the Court to consider several disputed issues of material fact, which renders this issue unsuitable for resolution on summary judgment.

Hence, the only way that Ameron could succeed on its motion for summary judgment as to Petroplast's CUTSA claim is to show that the information given to Friedrich during his August 2002 visit to the Curitiba Plant did not qualify as a "trade secret" in the first place. CUTSA defines a "trade secret" as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[139]

Based on the statutory requirement of secrecy, California courts hold that an "unprotected disclosure of the holder's secret terminates the existence of the trade secret."[140]

Ameron contends that Petroplast waived any trade secret protection when Piatti and his team disclosed "all the important details" relating to the paston system to Friedrich at their August 2002 meeting.[141] Ameron avers that this disclosure was without restriction and, additionally, that Petroplast did not insist on Ameron signing a

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139 CAL. CIV. CODE § 3426.1(d).

140 *See Forcier*, 123 F. Supp. 2d at 528 (internal citations and quotation marks omitted).

141 DMSJ OB 36 (citing Dep. of Pedro Pablo Piatti 430).

confidentiality and nondisclosure agreement before the parties met in Curitiba. It also argues that, at the time Petroplast disclosed this information, Ameron was under no obligation to compensate Petroplast. According to Ameron, it could have walked away from a deal free of restrictions and with the technical know-how to duplicate the paston process.[142] Thus, it contends that these facts, taken together, show that the paston information was no longer a "trade secret" after it was disclosed to Friedrich.

In response, Petroplast asserts that it gave Friedrich more comprehensive access to its information during his August 2002 visit than it had ever given to any other third-party. In addition, it notes that contemporaneous email communications among Piatti, Friedrich, and others show that Petroplast gave Ameron such expansive access not because Petroplast intended to make a free gift of the paston system to Ameron, but because Ameron demanded the right to see the information before it would negotiate to pay for it. Petroplast further avers that Ameron agreed not to use that information if it decided not to contract for its use.[143]

Having carefully considered the record before me, I am convinced that disputed issues of material fact remain as to whether Petroplast, in the context of Friedrich's August 2002 visit to Curitiba, took reasonable actions under the circumstances to protect

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142 *Id*. at 36-37. Ameron acknowledges, however, that Friedrich understood that Petroplast would not have wanted its paston system information disseminated and that he did not intend to use that information without Petroplast's permission. *See id*. 37-38.

143 *Id*. (citing Aff. of Pedro Pablo Piatti in Opp'n to DMSJ ¶¶ 8-17; Friedrich Dep. 158, 211).

the secrecy of its paston process. While Petroplast may have failed to bind Ameron to a formal confidentiality obligation, a question of fact exists as to whether there was an implicit requirement that Friedrich keep confidential the information he received in advance of negotiations with Petroplast. Indeed, Ameron did not just show up on Petroplast's doorstep and receive an unsolicited trove of information. Rather, based on previous email exchanges, Petroplast might have perceived that giving Ameron a first look at the goods was a prerequisite to engaging in further negotiations with Ameron. In any event, whether Petroplast made reasonable efforts under the circumstances to protect the secrecy of the information disclosed to Friedrich in August 2002 remains a heavily disputed issue of fact. Therefore, it is not appropriate for determination on a motion for summary judgment.[144]

Thus, for all of the foregoing reasons, I deny Ameron's motion for summary judgment as to Count II for violation of CUTSA.[145]

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144 *See K.C. Multimedia, Inc. v. Bank of Am. Tech. & Ops., Inc.*, 90 Cal. Rptr. 3d 247, 257 (Cal. Ct. App. 2009) ("the determination of whether a claim is based on trade secret misappropriation is largely factual.").

145 The parties do not dispute that to the extent Petroplast succeeds on its CUTSA claim, its common law misappropriation claim is preempted. *See* DMSJ AB 43; *K.C. Multimedia, Inc.*, 90 Cal. Rptr. 3d at 258. If Petroplast does not succeed on its CUTSA claim, however, its common law claim would not be preempted.

> "The elements of a claim for misappropriation under California law consist of the following: (a) the plaintiff invested substantial time, skill or money in developing its property; (b) the defendant appropriated and used the plaintiff's property at little or no cost to the defendant; (c) the defendant's appropriation and use of the plaintiff's property was without the authorization or consent of the plaintiff; and (d) the plaintiff can establish that it has been injured by the defendant's conduct."

III. CONCLUSION

For the reasons stated, I deny the parties' cross motions for summary judgment except to the extent that I have identified certain issues under Rule 56(d) as being without substantial controversy in this Memorandum Opinion.

IT IS SO ORDERED.

United States Golf Ass'n v. Arroyo Software Corp., 69 Cal. App. 4th 607, 618 (Cal. Ct. App. 1999). For many of the same reasons discussed in this section, the parties vigorously dispute several issues of fact material to the second, third, and fourth elements of a misappropriation claim. Specifically, they dispute whether Ameron appropriated information as to the paston system for "little or no cost," whether it had authorization in the form of the PO to use that information in its own manufacturing process, and whether Petroplast suffered an injury as a result. Thus, I similarly deny Ameron's motion for summary judgment as to Count V for common law misappropriation.